of statement or confession which a Magistrate is given liberty to record under section 115(i) and is *prima facie* inadmissible.

The learned Legal Adviser, however, relied upon the provisions of section 420 of the Criminal Procedure Code which reads as follows:—

> "If any Court before which a confession or other statement of an accused person recorded under section 115 or 256 is tendered or has been received in evidence finds that any of the provisions of such section have not been complied with by the Magistrate recording the statement, it shall take evidence that such person duly made the statement recorded and if it is satisfied of the same such statement shall be admitted if the error has not injured the accused as to his defence on the merits."

He argued that the fact that the persons making the statements were made on affirmation was a non-compliance with section 115(v). That is no doubt the case. But when the Court has ascertained that there has been a non-compliance, section 420 does not say that the irregularity can be *ipso facto* waived. On the contrary the Court shall take evidence from the Magistrate "that the person duly made the statement recorded", and shall only admit the statement if satisfied (a) that the statement was duly made and (b) that the error has not injured the accused as to his defence on the merits.

In the case before the Court, the Magistrate was called and could only confirm—what was obvious on the face of the statements—that the persons who made them had been affirmed. His evidence was useful in establishing that the words 'sworn statement' were not a mistake, but that in fact the persons were sworn. Thereupon it became clear that the statements had not been "duly made", and section 420 of the Criminal Procedure Code was of no assistance.

Section 420 is very useful where the statement has been properly taken but the Magistrate has failed to record the fact—just as in the present case the Magistrate might have deposed that the persons had not been sworn though the statements recorded the contrary. If, however, the effect of the Magistrate's evidence was that the statement had not been voluntarily made, it would obviously have been inadmissible. The same result follows when it has been proved to have been made on affirmation.

This finding is sufficient to dispose of the appeal, and I prefer to express no opinion upon the issue as to whether the fact of the statement having been made on affirmation would deprive it of its voluntary character, even apart from the provisions of section 115(v) which are peculiar to the F.M.S.

I would only add that even if the statements had been wrongly rejected I would still see no ground for ordering a new trial. Without going into all the merits of the case, it is clear that the *viva voce* evidence, which tended to incriminate Velupillay, was entirely inconsistent with the statements and the confession which pointed to the guilt of Raman II.

It is only recently that the Public Prosecutor has been empowered by law to appeal against an acquittal after a trial before an Assize Court, and so far as I am aware this is the first occasion upon which this power has been exercised after an acquittal upon a charge of murder. I do not think it likely that this Court would allow such an appeal even to the extent of granting a new trial, unless the facts of the case proved beyond all possible doubt that there had been a gross and palpable miscarriage of justice, or that there had been an error upon a point of law, which, if correctly decided, might reasonably have led to a different verdict. In the case before the Court, these elements are most conspicuously absent. Even if all the statements had been admitted, I do not see how the assessors could reasonably have found any of the accused guilty of murder. There is the additional consideration that the statements of the 1st, 2nd and 4th accused were not admissible in evidence against Raman II, and if they had been admitted against the persons who made them, it would clearly have been idle to warn the assessors that they should not take them into consideration against any one else. The inadmissible evidence would be before the Court, and the minds of the assessors and of the Judge would inevitably be influenced thereby. It is difficult to understand on what principle it was decided to charge all the accused jointly, when the result would be to deprive Raman II of the substance of a fair trial. In my view the opinion expressed by the learned trial Judge that the accused should not have been charged jointly was fully justified.

Appeal dismissed.

[APPELLATE CRIMINAL JURISDICTION]

POYSER, C.J.

February 12, 1940.

TAN POH WHATT v. PUBLIC PROSECUTOR.

[SELANGOR MAGISTRATE'S CRIMINAL APPEAL No. 84 of 1939]

Women and Girls Protection Enactment, (Cap. 156), S. 7 (b)—knowingly permitting premises to be used as brothel—proprietor and manager—knowledge of manager imputable to proprietor.

In a prosecution for knowingly permitting premises to be used as a brothel contrary to Section 7 (b) of the Women and Girls Protection Enactment (Cap. 156) the fact that the licensee of the premises had no personal knowledge of what took place on the premises is no defence so long as the necessary guilty knowledge can be imputed to the person to whom he has delegated the duty of conducting his business there.

Allen v. Whitehead,(1) applied.

Cases referred to:—

(1) *Allen v. Whitehead,* (1930) 1 K.B. 211.

(2) *Michi & Another v. Rex,* 3 M.L.J. 11.

MAGISTRATE'S CRIMINAL APPEAL.

W. G. W. Hastings for the Appellant.

A. J. Grattan-Bellew, Deputy Public Prosecutor, for the Public Prosecutor.

Poyser, C.J.—The appellant was charged with the following offence:—

> "That you on the night of the 18th day of October 1939 being the proprietor of the Choong Lan Lodging House No. 161 Batu Road did knowingly permit such premises to be used as a brothel, an offence under section 7 (b) of Cap. 156."

He was convicted and fined $75/- in default, one month's R.I. The evidence briefly was to the following effect. The appellant is the proprietor of a lodging house. On the night of the 18th of October 1939 the Assistant Protector of Chinese raided this lodging house, and in one room upstairs found a Malabar man and a Cantonese woman; in another room he found a Teochew man and a Hokkien woman. The Cantonese woman admitted being a prostitute, but also gave evidence to the effect that neither the appellant nor his manager Tan Choon saw her go upstairs. The following are extracts from her evidence:—

> "The man paid the room rent. When I came I waited downstairs. I saw people buy coffee. Downstairs was a coffee shop. I waited at back while the man went up and got a room....
>
> I stayed at back of shop. On the street at back after my friend got the room he called me up. No body saw me go up."

The Hokkien woman admitted being a prostitute in Penang, but also stated:—

> "On that day I came to Kuala Lumpur for a holiday, not for purposes of prostitution. I knew this man in Penang. We were lovers before, otherwise we would not have gone to the lodging house. I have never been to this lodging house before."

The appellant on this night did not admit anyone to his lodging house. His employee, the witness Tan Choon, did. The latter, however, stated that he did not know that the Malabar man brought a woman to the house, and that he asked the Chinese couple if they were married. The appellant's evidence, which was apparently accepted by the Magistrate, was to the effect that he looked after the coffee shop and had nothing to do with the letting of rooms. This part of the business he handed over to Tan Choon with strict instructions that only respectable people should be given rooms. The Magistrate held, having regard to the language, scope and object of the Enactment under which the appellant was charged, that he was liable for the acts of Tan Choon done in the course of his employment. I have no doubt that the Magistrate was right in coming to this conclusion, which is amply supported by authority. I need only refer to one ease viz: *Allen v. Whitehead,*(1). In that case it was proved that prostitutes met together and remained in a refreshment house, contrary to the provsions of section 44 of the Metropolitan Police Act 1839. The licensee had no personal knowledge of what took place, and had in fact instructed his manager that prostitutes were not to be allowed on the premises. It was held that the licensee, having delegated his duty so far as the conduct of the house was concerned to his manager, was liable to be convicted, and that the knowledge of the manager must be imputed to the employee.

That being the law which should be applied, the only question that remains is whether the evidence was sufficient to establish that Tan Choon knowingly permitted this lodging house to be used as a brothel. Brothel is defined in the Enactment as follows:—

> "Brothel means a house or place occupied or used by any two or more women or girls for the purpose of prostitution."

It has been held in *Michi (f) and Ancyu (f) v. Rex,*(2) that

> "proof of a solitary instance of user by two or more women or girls is not sufficient to sustain a conviction. The user must be habitual in either case, not a mere solitary act."

I think that case was correctly decided, and if it was, this appeal must be allowed; but whether it was or not, the evidence in this case was not in my opinion sufficient to establish the necessary guilty knowledge of Tan Choon, an essential part of the offence, and the appeal must therefore be allowed.

The Cantonese woman's evidence was that although she had been to this lodging house before, on this occasion as Mr. Hastings put it she was 'smuggled in'. Her evidence was apparently accepted by the Magistrate, and therefore allowing for the fact that he did not believe Tan Choon, the Magistrate was not justified in

finding, as regards her, that Tan Choon had the necessary guilty knowledge.

As regards the Hokkien woman, she had never been to this lodging house before and was a stranger to Kuala Lumpur. No doubt Tan Choon gave false evidence when he stated that he asked her and her companion if they were married; but there was nothing to indicate to Tan Choon that she was a prostitute. She was with a man of her own race and it was, as stated before, the first time she had been to these premises.

In view of the above I do not think there was sufficient evidence to substantiate the charge. The appeal is allowed and the conviction set aside. The fine of $75/- which has been paid will be refunded to the appellant.

Appeal allowed.

[APPELLATE CRIMINAL JURISDICTION]

POYSER, C.J.

February 12, 1940.

INDER SINGH v. PUBLIC PROSECUTOR.

[SELANGOR MAGISTRATE'S CRIMINAL APPEAL No. 81 of 1939]

Penal Code, S. 177—furnishing false information —statement made to a police officer investigating a case—Criminal Procedure Code, S. 112 (ii).

To sustain a conviction of making false statements to a police officer, it is not necessary to prove that the statement of the accused person recorded under S. 112 (ii) of the Criminal Procedure Code was made in answer to questions put to him by the investigating officer. It is sufficient if such false statement is substantially an answer to one or more questions addressed to the witness before the statement is made.

Cases referred to:—

(1) *Empress v. Baikanta Bauri,* I.L.R. 16 Cal. 349.

(2) *Queen Empress v. Bhagwantia,* I.L.R. 15 All. 12.

MAGISTRATE'S CRIMINAL APPEAL.

Joaquim for Appellant.

Grattan-Bellew for Public Prosecutor.

Poyser, C.J.—The appellant was charged with the following offence:—

> "That you on 19.8.39 at 10 a.m. at Campbell Road Police Station being legally bound to furnish information on the subject of alleged acceptance of illegal gratification by a Pathan Sergeant at Central Workshop furnished information to wit "I have never seen this document (2) before. I have never seen a draft of it. I had nothing to do with the petition nor did I cause it to be written and sent" which you knew to be false, and the information which you were bound to give was in respect of the apprehension of an offender and thereby committed an offence punishable under section 177 Penal Code, Cap. 45."

The evidence was as follows. The Police received an anonymous letter (P2.) in which it was alleged that a sergeant in the police force was accepting bribes. As a result of such allegations Mr. Elphinstone, a police officer, received directions from the Deputy Public Prosecutor (P4.) to investigate the offences that were alleged to have been committed. Mr. Elphinstone compared the letter P2. with other communications he had received, and came to the conclusion that P2. was typed by the witness Kanagasapai, a petition writer. He then interviewed Kanagasapai and, in consequence of what the latter said, called the appellant to his office and asked him if he had sent P2. The appellant then made the statement set out in the charge.

Kanagasapai gave evidence, and stated that he typed P2. on the appellant's instructions and was paid for so doing. The appellant gave evidence, and again denied having anything to do with P2. The Magistrate believed Kanagasapai, stating that he was impressed by the straightforward way he gave his evidence, and accordingly convicted the appellant.

On appeal it was argued that the provision of law creating a legal obligation to state the truth must be strictly construed, and the case of *Empress v. Baikanta Bauri,*[1] was cited.

It was there held that before a conviction can be sustained of making false statements to a police officer, it must be proved that such statements were made in answer to questions put to the accused by an investigating officer. This case, however, does not appear to have been followed in all the Indian Courts for, in the case of *Queen Empress v. Bhagwantia,*[2] the Court held:—

> "It is sufficient if such false statement is substantially an answer to one or more questions addressed to the witness before the statement is made.

I prefer to follow the latter decision, and it is quite obvious in this case (the point not being raised in the Magistrate's Court) that the false statement which the appellant was alleged to have made was made in answer to one or more questions put to him by Mr. Elphinstone, and such questions he was legally bound to answer truly (section 112 (ii) Criminal Procedure Code).